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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/714,728	11/17/2003	Kyle A. Ryan	STOP-I-1002	4662

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EXAMINER

ELOSHWAY, NIKI MARINA

ART UNIT	PAPER NUMBER
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3781

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/714,728  
Filing Date: November 17, 2003  
Appellant(s): RYAN ET AL.

**MAILED**  
**NOV 24 2006**  
**GROUP 3700**

\_\_\_\_\_  
David Lowe (Reg. No. 39,281)  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed September 8, 2006 appealing from the Office action mailed January 26, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

5,148,936	DEGROW	09-1992
6,745,505	MORAN	06-2004
6,311,860	REIDINGER ET AL.	11-2001

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

(A) Claims 1-8, 14 and 15 have been rejected under 35 U.S.C. 103(a) as being unpatentable over DeGrow (U.S. 5,148,936) in view of Moran (U.S. 6,745,505). DeGrow discloses the claimed method except for the step of selecting the seal from a plurality. Moran teaches that it is known to select a seal from a plurality in order to distinguish bottles from each other. It would have been obvious to one having

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ordinary skill in the art at the time the invention was made to provide the method of DeGrow with the user selecting a seal from a plurality as taught by Moran in order to distinguish the beverage containers.

Regarding claims 3-7, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the modified method of DeGrow with the indicia as taught by Moran, in order to distinguish the beverage containers.

Regarding claim 8, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the seal of DeGrow with a substantially triangular shape, since applicant has not disclosed that having a triangular shape solves any stated problem or is for any particular purpose, and it appears that a substantially rectangular shape of DeGrow would perform equally well as the substantially triangular shape of applicant's invention.

(B) Claims 9-13 have been rejected under 35 U.S.C. 103(a) as being unpatentable over DeGrow (U.S. 5,148,936) in view of Moran (U.S. 6,745,505) as applied to claim 1 above, and further in view of Reidinger et al. (U.S. 6,311,860). The modified method of DeGrow does not teach the removably attached cover. Reidinger et al. teaches that it is known to provide a lid with a removably attached cover. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the modified method of DeGrow the cover of Reidinger et al. over the lid and seal, in order to prevent access to the inner indicia:

#### **(10) Response to Argument**

##### *(A) The primary reference of DeGrow (U.S. 5,148,936).*

Appellant argues that the seal of DeGrow cannot be considered a "plate". It is the examiner's position that the term "plate", by itself, is not limited to structures which are strictly planar. The specification does not define the term "plate" as strictly planar and completely flat. Although the seal of DeGrow includes a vertical step, the seal is considered a plate to the degree set forth in the claims.

Appellant argues that the lug of DeGrow lacks a projection having a constant cross section. The limitation in claim 1 which refers to the cross section of the projection recites “a projection having substantially constant cross-section in a plane parallel to the plate”. The plane parallel to the plate is horizontally extending. When a horizontal cross-section is taken of the projection 56 of DeGrow, the cross section is considered constant to the degree set forth in the claim and to the degree the projection of the present application is considered constant. Since the projection of DeGrow and the projection of the present application both have a circular cross-sectional shape in a plane parallel to the plate, the projection of DeGrow has a constant cross-section.

Appellant argues that “disengaging the sealing flange 64 from the lid does not cause the arm 60 to be ‘fully separated from the lid’.” Claim 1 recites that “the seal is fully separated from the lid and disposable when the projection is not inserted into the opening”. The seal of DeGrow is not permanently attached, at any point, to the lid. The snap engagement of the lugs allow the seal to be fully removed from the lid without destruction of either component. The DeGrow closure assembly meets the limitation of claim 1 because the seal may be fully separated from the lid when the projection is not inserted into the opening.

*(B) DeGrow (U.S. 5,148,936) as modified by Moran (U.S. 6,745,505)*

Appellant argues that there is no motivation to modify DeGrow. Motivation for the modification of DeGrow by Moran was provided in the rejections of the Final Office Action mailed January 26, 2006. Specifically, the rejection states “[i]t would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the method of DeGrow with the user selecting a seal from a plurality as taught by Moran in order to distinguish the beverage containers.” The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to

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those of ordinary skill in the art. *In re Keller*, 642 F. 2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In this regard, a conclusion of obviousness may be based on common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference. *In re Bozek*, 416 F. 2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969). The motivation to modify the DeGrow reference is provided throughout the Moran reference. Moran teaches the desirability of coding caps to distinguish beverage containers.

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

(C) *DeGrow (U.S. 5,148,936) as modified by Moran (U.S. 6,745,505) and Reidinger et al. (U.S. 6,311,860)*

As recited above, the seal of DeGrow is not permanently attached, at any point, to the lid. The snap engagement of the lugs allow the seal to be fully removed from the lid without destruction of the either component. Regarding the irregular upper surface of the seal of DeGrow, the vertical step of the DeGrow seal does not prevent the application of indicia.

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**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

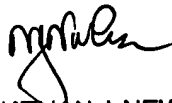
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